IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 817 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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DINESHKUMAR KANJIBHAI CHAUDHARI - Applicant(s)
Versus
STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :

MR HARSHADRAY A DAVE for Applicant(s) : 1,
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR HARIN P RAVAL for Respondent(s) : 2,
NOTICE SERVED BY DS for Respondent(s) : 3 - 5.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 22/06/2007

ORAL JUDGMENT

1. Rule. Learned Advocates appearing on behalf of the respondents waive service of rule on behalf of

the respondents.

2. Present petition has been filed by the petitioner – original complainant for an appropriate order for quashing and setting aside the order dated 31st July, 2003 passed by the JMFC, Palanpur and confirmed by the learned Additional Sessions Judge, Palanpur by judgment dated 21st May, 2004 passed in Criminal Revision Application No. 24 of 2003. It is also further prayed to join respondent No.2 and try him as accused in Criminal Case No. 5645 of 1997.

3. Facts leading to the present petition in nutshell are as under :

That the petitioner herein- complainant filed complaint in CR-II – 121/97 naming four persons as accused inclusive of respondent No.2-herein for the offence punishable under Section 427, 506(2), 504 and 114 of the Indian Penal Code. That the Investigating Agency filed the Charge-sheet before the Court of Chief Judicial Magistrate, Palanpur on 15th July, 1997 only against three person/accused. However, respondent No.2 was not charge-sheeted. The

case was transferred to the Court of learned Judicial Magistrate (First Class) and the same was registered as Criminal Case No. 5645 of 1997. The trial commenced against three accused against whom charge-sheet was filed and during trial evidence of three witnesses viz. Complainant, Shri Vishubhai Kanjibhai Chaudhary and Shri Popatbhai Chaudhary have been recorded, that Shri Vishubhai Kanjibhai Chaudhary and Shri Popatbhai Chaudhary are eye-witnesses. It is the case on behalf of the petitioner that considering the evidence of the aforesaid two witnesses, name of respondent No.2 is disclosed who has taken active participation in the crime and respondent No.2 was to be arraigned as a accused and therefore, the petitioner submitted an application at Exh. 34 before the learned J.M.F.C. to arraign respondent No.2 as accused in exercise of powers under Section 319 of the Criminal Procedure Code. Learned J.M.F.C., Palanpur vide order dated 31st July 2003 rejected the said application by holding that the applicant has no locus to submit such application and that it is only Public Prosecutor who can submit the application and even the said application is also not signed by the complainant and that even at the time of trial also the complainant can submit only written arguments.

The learned J.M.F.C. also held that on considering the evidence of the aforesaid three witnesses and as in Examination-in-Chief name of respondent No.2 is not disclosed as fourth accused, therefore, rejected the application under Section 319 of the Criminal Procedure Code. Being aggrieved and dissatisfied with the order passed by the learned J.M.F.C., dated 31st July, 2003 below Exh. 34, the petitioner preferred Revision Application before the learned Sessions Judge, Banaskantha at Palanpur being Criminal Revision Application No. 24 of 2003 and the learned Sessions Judge, Banaskantha at Palanpur by his judgment and order dated 21st May, 2004 dismissed the said Revision Application. Being aggrieved and dissatisfied with the aforesaid judgments passed by the Courts below, the petitioner – original complainant has preferred the present petition under Article 226 of the Constitution of India.

4. Shri Harshadray Dave, learned Advocate appearing on behalf of the petitioner has vehemently submitted that both the Courts below have materially erred in exercising the powers under Section 319 of the Criminal Procedure Code and have materially erred

in rejecting the application of the petitioner by holding that the petitioner – original complainant has no locus to file such application. He has also further submitted that even on merits, the learned trial Court has committed an error in misreading the evidence and not properly appreciating the evidence of three witnesses more particularly evidence of Shri Popatbhai who has specifically given the name of respondent No.2. He has further submitted that the learned trial Court has materially erred in observing that though Shri Popatbhai has given name of respondent No.2 in his Examination-in-Chief, and as the complainant has not given the name of respondent No.2, he is not to be arraigned as a accused. It is submitted that the learned trial Court has committed an error in not exercising the powers under Section 319 of the Criminal Procedure Code considering evidence on record, therefore, it is requested to allow the present application.

5. Learned Advocate appearing on behalf of respondent No.2 has submitted that there are concurrent findings given by both the Courts below and therefore, this Court may not entertain the

present application in exercise of powers under Article 227 of the Constitution of India. He has also further submitted that in the Examination-in-Chief, the complainant has not given name of respondent No.2, therefore, the learned trial Court has rightly rejected the application to arraign respondent No.2 as accused. It is submitted that in the facts and circumstances of the case, the order passed by both the Courts below are not required to be interfered with and powers under Section 319 are to be exercised sparingly. Shri R.C.Kodekar, learned Additional Public Prosecutor has requested to pass an appropriate order.

6. Heard the learned Advocates appearing on behalf of the respective parties.

7. It is required to be noted that in the F.I.R., name of respondent No.2 was specifically mentioned, however, at the time of filing of charge-sheet, the charge-sheet was filed against three accused and the charge-sheet was not filed against respondent No.2 i.e. Ramsangbhai Hatihibhai Chaudhary who has attributed specific role. Thus name of

respondent No.2 is disclosed during the course of trial when evidence is recorded. However, the learned trial Court has ignored the evidence of Shri Vishubhai Kanjibhai Chaudhary and Shri Popatbhai Chaudhary (both eye witnesses) on the ground that the original complainant has not specifically given name of respondent No.2. It is required to be noted that both Shri Vishubhai Kanjibhai Chaudhary and Shri Popatbhai Chaudhary are eye witnesses. Even in the Examination-in-Chief of the complainant, he has referred to F.I.R. and admitted the F.I.R. in which respondent No.2 was mentioned as accused. Of course as no question was asked by the learned Additional Public Prosecutor, he has not specifically given name but he has stick to the allegations in the F.I.R. Apart from that when eye-witness has given specific name of respondent No.2 attributing a specific role, the learned trial Court has materially erred in ignoring the same. On considering the evidence on record, name of respondent No.2 i.e. Ramsangbhai Hathibhai Chaudhary is disclosed attributing particular role, and therefore, it was the duty of the learned trial Court to exercise powers under Section 319 of the Criminal Procedure Code. The learned Trial Court has considered the matter too

technically by observing that the complainant has no locus to submit an application and that only learned Additional Public Prosecutor can submit an application. Be that as it may. Without entering into larger question, even considering Section 319 of the Criminal Procedure Code it was the duty of the learned trial Court to exercise powers and if in the course of trial, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the learned trial Court should have exercised the power and joined respondent No.2 as accused and ought to have proceeded against respondent No.2 for the offence which he appears to have been committed. It is required to be noted that power under Section 319 is an extra ordinary power conferred to the Court to do real justice. Now considering the provisions of Section 319 of Criminal Procedure Code, powers of the trial Court and considering the evidence on record more particularly Shri Vishubhai Chaudhary at Exh. 30 and Popatbhai Chaudhar (both eye-witnesses) and as the name of Ramsangbhai Hathibhai Chaudhary is disclosed attributing specific role, the learned trial Court ought to have proceeded further against respondent

No.2 by joining him as accused along with other accused by exercising powers under Section 319 of Criminal Procedure Code. By not exercising powers under Section 319 and not joining respondent No.2 as accused and not proceeding further against respondent No.2 along with other accused, the learned trial Court has failed in its duty and failed to exercise jurisdiction which ought to have been exercised by it. Under the circumstances the impugned orders are required to be quashed and set aside and respondent No.2 is required to be joined as accused in the aforesaid Criminal Case No. 5645 of 1997 and the learned trial Court is required to proceed against him along with other accused.

8. For the reasons stated above, the present Special Criminal Application succeeds. The order dated 31st July, 2003 passed below Exh. 34 by the learned J.M.F.C., Palanpur in Criminal Case No. 5645 of 1997 as well as the judgment and order dated 21st May, 2004 passed by the learned Additional Sessions Judge, Banaskanta at Palanpur in Criminal Revision Application No. 24 of 2003 are hereby quashed and set aside. The learned Trial Court is directed to join

respondent No.2 as accused in Criminal Case No. 5645 of 1997 and is also directed to proceed against respondent No.2 along with other accused. Rule is made absolute to the aforesaid extent.

[M.R.Shah, J.]

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